United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2059

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH LUNZ,

Plaintiff-Appellee,

-against-

PETER PREISER, Commissioner of Department of Correctional Services, JEROME W, PATTERSON, Superintendent, Eastern New York Correctional Facility,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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-against-	:	75-2059
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Defendants-Appellants.	:	

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants-appellants appeal from an order of the United States District Court for the Southern District of New York, Wyatt, J., denying their motion to set aside a default judgment.

Question Presented

Did the District Court abuse its discretion in refusing to set aside the default judgment?

Statement of Facts

A thirty-nine page handwritten complaint with one hundred seven pages of handwritten exhibits was filed by an inmate of the Eastern Correctional Facility on January 13, 1975 in the United States District Court for the Southern District of New York. In the complaint, plaintiff alleged that his transfer from one correctional facility to another was unconstitutional and that the defendants were withholding his mail.

The United States Marshal served defendant Preiser with the summons and complaint on February 3, 1975 and defendant Patterson on February 5, 1975.

An "application for entry of default" was sworn to February 18, 1975 (A. 153)* and received by defendant Preiser on February 24, 1975 (A. 166), the date his answer was due,** and by defendant Patterson on February 20, 1975 (A. 166), five days before his answer was due. The application was made returnable February 24, 1975. Defense counsel received the application on February 27, 1975 (A. 166).

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* Number preceded by "A" refer to appellants' appendix.
** February 23, 1975, fell on a Sunday.

The memorandum of the District Court granting plaintiff a default judgment was filed March 3, 1975, seven days after defendant Preiser's answer was due and six days after defendant Patterson's answer was due.

The Court ordered that plaintiff be transferred back to the Eastern New York Correctional Facility and be enrolled in the vocational plumbing school there and that the defendants expunge from the plaintiff's records the reasons for the transfer. Judgment was entered March 4, 1975.

Defense counsel was about to request an extension of time to respond to the complaint on March 5, 1975, when he learned of the default judgment (A. 167). In lieu thereof, counsel filed a notice of motion with a supporting affidavit requesting an order pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure setting aside the default judgment on the basis of excusable neglect.

In an affidavit in support of the motion to set aside the default, counsel noted his extensive work load the week before the answer was due and the week when the application for a default was received (A. 167-68) and noted his other pending cases (A. 168). In addition, counsel explained that

(at A. 168-69)

> "[he] did not cavalierly fail to answer the complaint or the motion for default. Rather [he] attempts to respond to the pro se matters as expeditiously as possible but due to the press of work, extensions must often be requested, and requests for extensions sometimes cannot be promptly filed, even though [he] has worked most evenings and weekends. ... Unlike a private practioner, the Attorney General cannot turn down a case.
>
> "Because of this volume of work, it has been usual to request and receive extensions to respond to complaints and petitions. No previous request for an extension has been denied deponent in other cases even where inadvertently requested after the date the response was due."

Counsel offered the defenses on the merits, that plaintiff's transfer occurred before this Court's decisions in Newkirk v. Butler, 499 F. 2d 1214 (2d Cir. 1974) cert granted sub nom Preiser v. Newkirk, ___ U.S. ___, 95 S. Ct. 172 (1974) and United States ex rel. Haymes v. Montanye, 505 F. 2d 977 (2d Cir. 1974). The Supreme Court stated in Wolff v. McDonnell, 418 U.S. 539 (1974) (at pp. 573-74) that new procedural rules affecting prison discipline should not be made retroactive out of consideration for the burden on state officials. Furthermore, assuming arguendo that plaintiff's transfer was

improper without a hearing, proper relief was the providing of a hearing.

On the return date of the motion, March 21, 1975, defense counsel appeared before the District Court. The Court expressed dissatisfaction with his other relationships with the office of the Attorney General but did not address himself to the merits of setting aside this default. No stenographic record was made, and the Court wrote no decision. A memorandum endorsement denying the motion was noted on the motion and filed on March 24, 1975.

A notice of appeal was filed April 1, 1975. On April 11, 1975 the District Court granted a stay pending appeal.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING DEFENDANTS' MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

The defendants' default was not willful and the defendants had a meritorious defense to the complaint. Under these circumstances the District Court clearly abused its discretion in denying defendants' motion to set aside the default judgment.

The default here was clearly not a willful one. Certainly the short time involved cannot be considered gross or willful neglect when considered in light of defense counsel's heavy case load presented in an affidavit to the District Court (A. 167-68) and in light of the fact that unlike a private law firm the Attorney General cannot turn down a case and unlike the federal government the State is given twenty days to reply to a complaint rather than sixty.

The period of six to seven days here between the time defendants' answers were due and the default judgment, or even the eight to nine days between the time the answers were due and defense counsel prepared a request for an extension of time, hardly arise to the level of being "a serious showing of willful default" as was present in Trans World Airlines Inc. v. Hughes, 449 F. 2d 51 (2d Cir., 1971), rev'd on other grounds 409 U.S. 363 (1973) rehearing denied 410 U.S. 975 where there was a "deliberate, knowing, willful and plainly announced refusal to comply with an order requiring [Hughes'] appearance for the taking of his deposition... and which had been served long in advance of the return date." Nor was there a conscious decision by counsel not to oppose the entry of a default. United States v. Erdoss, 440 F. 2d 1221 (2d Cir.), cert. den. sub nom Horvath v. United States, 404 U.S. 849 (1971).

Under all these circumstances the default was clearly not willful and the District Court erred in granting default. As this Court stated in Gill v. Stolow, 240 F. 2d 669, 670 (2d Cir. 1957), "general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default."

Not only was the default not willful but defendants had a meritorious defense and should have been given their day in court. Defendants' defense, that Newkirk v. Butler, supra, and United States ex rel. Haymes v. Montanye, supra, are not retroactive, deserved consideration. Plaintiff was transferred on May 11, 1974. Newkirk v. Butler, supra, was not decided until June 3, 1974 and United States ex rel. Haymes v. Montanye was not decided until October 21, 1974.

At the time plaintiff was transferred, Wells v. McGinnis, 344 F. Supp. 594 (S.D.N.Y., 1972); United States ex rel. Haymes v. Montanye, ___ F. Supp. ___ (Civil 1972-410, W.D.N.Y., 1973); Schumate v. New York, 373 F. Supp. 1166 (S.D.N.Y. April 12, 1974); and Beathem v. Manson, 369 F. Supp. 783 (D. Conn. 1973) indicated that a transfer, such as plaintiff's, was proper notwithstanding the fact that he had not been provided notice and a hearing. Only Newkirk v. Butler, 364 F. Supp. 497 (S.D.N.Y. 1973) had held that notice and a hearing were required.

The Supreme Court extensively considered the issue of the retroactivity of new procedural rules for correctional facilities in Wolff v. McDonnell, 418 U.S. 539 (1974) (at 573-74). The Court held that new procedural rules should not be applied retroactively because of the burden that would be placed on state officials. Accord, Cox v. Cook, ___ U.S. ___, 43 U.S.L.W. 5513 (Mar. 24, 1975). The District Court abused its discretion in not permitting the defendants to raise their meritorious defense.

It should be emphasized that no substantial prejudice to plaintiff resulted from this short delay. While there is no doubt that plaintiff suffered some prejudice from the delay, the prejudice is less than that resulting from the twenty-one days that lapsed between the issuing of the summons and its service by the Marshal. Moreover, by granting a stay pending the appeal, the District Court recognized that the importance of considering certain legal issues outweighed any possible prejudice to the plaintiff.

Any doubt whether the default should be set aside should be resolved in favor of setting it aside where there is no substantial prejudice to the plaintiff, the defendants are not guilty of gross neglect, the delay was short, and the defendants claim the existence of and present a basis for a

meritorious defense, Tolson v. Hodge, 411 F. 2d 123 (4th Cir., 1969); Thorpe v. Thorpe, 364 F. 2d 692 (D.C. Cir., 1966); SEC v. Vogel, 49 F.R.D. 297 (S.D.N.Y. 1969). The preferred disposition of a case is on its merits rather than by default. Gomes v. Williams, 420 F. 2d 1364 (10th Cir. 1970); Horn v. Intellection Corp., 294 F. Supp. 1153 (S.D.N.Y., 1968). A judgment by default is a drastic sanction that should be applied only under extreme circumstances. Independent Production Corp. v. Loews Inc., 283 F. 2d 730, 733 (2d Cir. 1960), Syracuse Broadcasting v. Newhouse, 271 F. 2d 910 (2d Cir. 1959); Gill v. Stolow, 240 F. 2d 669 (2d Cir., 1957).

Finally, none of the averments in defense counsel's affidavit to the District Court in support of his motion to set aside the default were contradicted by plaintiff or the Court. No stenographic record was made at the time the motion was denied, and the District Court did not prepare a written decision. Such an unexplained denial of a motion to set aside a default where the delay was so short and not the result of gross neglect, and where there was a clearly meritorious defense, should be reversed as an abuse of discretion.

CONCLUSION

THE ORDER BELOW SHOULD
BE REVERSED.

Dated: New York, New York
June 16, 1975

Respectfully submitted,

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Defendants-Appellants

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CAROL DONOHUE, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 16th day of June, 1975, she served the annexed upon the following named person:

PAULA VAN METER, ESQ.
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New York, N. Y. 10005

Attorney in the within entitled Action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Carol Donohue

Sworn to before me this
16th day of June, 1975

Ralph L McMurray

Assistant Attorney General
of the State of New York